



Tiffany A. Harrod
tharrod@pecklaw.com



Joshua M. Pruett
jpruett@pecklaw.com

Construction Contracts That Mitigate Impacts From Tariffs and Immigration Enforcement

Tariffs and immigration enforcement are at the forefront of the federal government's agenda in today's world, and both can have a substantial impact on a construction contractor's cost and time to perform its work. However, with proper planning and contract negotiations, contractors can eliminate, or at least, minimize the risk of delays and cost increases driven by tariffs and immigration enforcement efforts. Potential impacts caused by tariffs and immigration enforcement should be evaluated during pricing, contract negotiations, and throughout the construction project. Current contracts should be reviewed to assess contractors' rights to change orders and time extensions, and drafting and negotiating of new contracts should include planning for price increases resulting from the impact of tariffs and immigration enforcement.

This article discusses ways that contractors can proactively address impacts and reduce the risk of costly disputes related to steel and aluminum tariffs, labor shortages, supply chain disruptions, force majeure events, supplier and subcontractor changes and renegotiations, communication and notice management, and timing and delay impact management.

1. Tariff & Price Escalation Adjustment Clauses

Contractors should negotiate a Price Escalation Clause or Tariff Adjustment Clause to address increases in material costs imposed by tariffs. The provision should specifically call out tariffs or import duties as a permissible reason for adjusting the price. Material price escalation clauses allow the parties to adjust the contract price when there are significant increases in the market price for construction materials. To be effective, the

price escalation should be benchmarked to a reliable third-party material index or a pre-defined material price in a given geographic area, with a price escalation trigger based on a defined increase. Clearly identify how the cost of price increases will be allocated. For example, a price schedule can allow for an escalation change order when a material price exceeds 15% over the December 31, 2024 market price.

2. Force Majeure Clauses

Force majeure provisions generally allow contractors to seek relief from contractual obligations when external factors prevent planned project execution. Force majeure terms may be triggered by language used in Executive Orders that have been issued, including reference to "tariffs," "trade-wars," "terrorism," and other conditions. Contractors should stay on top of all notice provisions and deadlines and always default to providing notice when in doubt.

Force majeure provisions should be negotiated to allow contractors to avoid liability for delays and cost impacts based on unforeseen events.

3. Contingency Clauses

A contingency clause designates a specific amount of money within the project budget to cover unforeseen costs or situations that may arise during construction, acting as a safety net for unexpected expenses, like material price fluctuations, and allowing the project to continue without major disruptions if such events occur. Contractors should negotiate and regularly evaluate contingency clauses to address specific uses, and include events such as tariffs, supply chain disruptions, labor shortages, and labor increases. Contingency clauses should specifically define the applicable contingencies, identify the approval process, and provide a protocol for managing the funds and process.

4. Flow-Down Clauses

Contractors should review flow-down provisions to ensure they require compliance with Immigration Customs and Enforcement (“ICE”) regulations, new regulations related to Diversity, Equity, and Inclusion, and notice provisions for force majeure events. Flow-down clauses should require subcontractors to ensure proper documentation and handling of any events that could have an impact on the project.

5. Preemptive Change Orders

Contractors should consider preemptive change orders to preserve claims where the amount of a claim is not known, and the total delay impact is not known. Preemptive change orders should be thought of as a reservation of rights. Contractors can reserve claims for longer-than-expected lead times for materials caused, directly or indirectly, by tariffs or import duties. Labor shortages or interruption of work caused directly or indirectly by immigration enforcement actions in the project vicinity can also be identified as potential impacts to a project. While a delay or impact may not allow for increased compensation, it will still help the contractor and its subcontractors avoid defaulting under the contract.

6. Advance Procurement

Contractors should consider proactively procuring materials and arranging for their storage and entering into prefabrication agreements to mitigate the impact of price escalations and shortages. Contract terms should address storage logistics and associated costs to ensure clarity and preparedness for market fluctuations and job-site preparations.

7. Diligent Documentation

When issues related to tariffs or immigration arise on your projects, document them thoroughly, give ample and prompt notice of the issues to the owner and/or upstream parties, submit change orders as needed, and submit delay claims promptly. Open communication and a plan to address tariff impacts and immigration enforcement issues will help keep projects moving despite the obstacles caused by these issues.

8. Communicate and Negotiate

Companies should be aware of any notice requirements for delays or cost increases. Communication is key: the contractor should address escalation issues with owners and subcontractors promptly and discuss specific provisions addressing cost or schedule changes. If no provision currently allows for adjustments necessitated by tariffs or immigration enforcement, the contractor should make the case for changing the contract to keep the project moving and submit proposed change orders to add relevant provisions.

Peckar & Abramson is monitoring government developments that may impact the construction industry. Proactively staying updated on policy changes and funding risks is the best way to stay ahead of necessary contingency planning. Ensure you are staying up to date and subscribe to P&A’s alerts [here](#).

The information provided in this Client Alert does not, nor is it intended to, constitute legal advice. Readers should not take or refrain from taking any action based on any information contained in this Client Alert without first seeking legal advice.

As always, we are pleased to share insights and updates related to legal issues of interest with clients and friends of the Firm. Our records reflect that the recipient of this message is not a European Union “Data Subject” as defined by the General Data Protection Regulation (GDPR), enacted on May 25, 2018. If you are or consider yourself to be a Data Subject under the EU’s GDPR, kindly email Megan Seybuck at mseybuck@pecklaw.com right away. The GDPR requires that all European Union Data Subjects provide explicit consent in order to continue to receive our communications.